Editor's note: Appealed – aff'd, Civ.No. 80-203 PHX-CLH (D. Ariz.), aff'd, No.82-5324 (9th Cir. Apr. 6, 1983)

UNITED STATES
v.
ANDY SYNDBAD

IBLA 78-377 Decided August 29, 1979

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., holding Ruth Nos. 1 through 8 lode mining claims to be void. AR 034833.

Affirmed.

1. Administrative Procedure: Generally – Contests and Protests: Generally – Evidence: Generally – Mining Claims: Contests – Rules of Practice: Evidence – Rules of Practice: Government Contests

In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case and then rest. The contest complaint could be dismissed if the Administrative Law Judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

2. Contests and Protests: Generally -- Mining Claims: Contests -- Rules of Practice: Government Contests

A sufficient prima facie case by the Government does not require positive proof that there has been no discovery made or that the mining claim is nonmineral in character. Upon the Government's presentation of a prima facie case, the burden shifts to the claimant to prove by a preponderance of the evidence that he indeed has a discovery of a valuable mineral deposit within the limits of the claim.

3. Administrative Procedure: Hearings -- Hearings -- Mining Claims: Contests -- Rules of Practice: Appeals: Hearings

A second hearing of a Government mining contest will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he was actually present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. A petition to reopen a hearing of a Government mining contest will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery.

APPEARANCES: J. Stanley Martineau, Esq., Bernard C. Porter, Esq., Porter, Stahnke, Phillips, Kempton & Tobler, Tempe, Arizona, for appellant; Fritz L. Goreham, Esq., Office of Field Solicitor, Department of the Interior, Phoenix, Arizona, for contestant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

This case had its genesis in a contest complaint filed by the Arizona State Office, Bureau of Land Management (BLM), pursuant to 43 CFR Part 1852 under the styling of United States v. Andy Syndbad, Jacob C. Alexander, and Ruth C. Mason, Arizona 034833. This complaint, dated August 30, 1965, alleged that "valuable minerals have not been found within the Ruth Nos. 1 through 8 lode mining claims so as to constitute a valid discovery within the meaning of the mining laws." The contestees denied the charge.

The matter came on for a hearing before John R. Rampton, Jr., then a hearing examiner (hereinafter referred to as Judge Rampton or the Judge) at Phoenix, Arizona, on February 28, 1967. 1/ At the hearing, BLM was represented by L. K. Luoma, Esq., Field Solicitor, and Fritz Goreham, Esq., Office of the Solicitor, Phoenix, Arizona. The contestees, Andy Syndbad and Jacob C. Alexander, appeared pro sese. 2/

The Government presented its case by the testimony and evidence of Charles K. Miller and Luther S. Clemmer, each a mining engineer employed by BLM. Miller testified to his examinations of all the claims during various occasions in 1965 and 1967 and gave his expert opinion, based on his sampling, that a person of ordinary prudence would not be justified in expending his labor and means with a reasonable prospect of success in developing a paying mine. Clemmer testified similarly. The Government's showing was considered by Judge Rampton to constitute a prima facie case of no discovery.

The contestees presented no sworn testimony or evidence, but generally engaged the Judge in debate over the authority of the Department of the Interior to conduct the proceeding and alleged various violations of their Constitutional rights. Despite repeated warnings from the Judge that he would have to decide the discovery issue on the record of the hearing, appellants offered no positive evidence to support a discovery on any of the eight claims at issue. Nor did they seek a continuance to enable later introduction of any evidence in their behalf. At most, contestees argued that the showing of gold and silver in certain assays offered by BLM was evidence of a discovery; no evidence was adduced by the contestees, however, to support their allegation that a discovery of valuable minerals in paying quantities had been made within the limits of any claim. Specifically, Syndbad stated that he had exposed a number of lodes of caliche in the conglomerate, but had not exposed the actual mineral-bearing lode, if any, which would typically be under the caliche over-burden. Indications from the shears led him to believe that valuable mineralized veins existed within the limits of the claims, but at the time of the hearing he was still prospecting (Tr. 93, 97).

Thereafter, on August 28, 1967, Judge Rampton issued a decision declaring the Ruth Nos. 1 through 8 lode mining claims in secs. 10 and 11, T. 1 N., R. 8 E., Gila & Salt River meridian, Pinal County, Arizona, to be void since no discovery had been made on any of the claims as required by law. The decision recited the manner in which

1/ The change of title of the hearing officer from "hearing examiner" to "Administrative Law Judge" was effectuated by order of the Civil Service Commission, 37 FR 16787 (Aug. 19, 1972).
2/ Contestee Ruth C. Mason had previously conveyed her interest in the Ruth claims to Jacob C. Alexander.

an appeal to the Director, BLM, could be taken, emphasizing that a filing fee of $5 per claim, or $40 for all eight claims, was required to be filed with the notice of appeal.

The contestees attempted to take an appeal from the Judge's decision, but accompanied their notice of appeal with payment of $8 only, rather than the required $40 for eight claims. In their statement of reasons, appellants referred to the affidavit of impecuniosity which had been accepted previously by Judge Rampton in waiving their charges for the hearing transcript and contended that they should likewise be relieved of the need to pay any filing fees for the appeal. Upon receipt of the notice of appeal, the Judge again notified appellants of the mandatory nature of the filing fee and that it could not be waived. Nevertheless, he transmitted the record and notice of appeal to the Director, BLM, for action by the Office of Appeals and Hearings. On October 3, 1967, the Chief, Branch of Mineral Appeals, wrote to appellants and advised that unless an additional $32 was submitted by October 11, the appeal could be considered as to only one claim, and that failure to designate within 30 days of receipt of the instant letter which claim they wished to have considered would result in rejection of the appeal in its entirety. The record shows that neither Syndbad nor Alexander ever received the October 3, 1967, communication. However, the BLM Office of Appeals and Hearings held that the letter of October 3, addressed to the record address of each appellant and returned by the Postal Service as undelivered, constituted constructive notice of its contents to appellants under 43 CFR 1840.0-6(e)(3), and hence the appeal could not be considered by BLM. The case was returned to Judge Rampton for closing as provided in 43 CFR 1842.4(c). Refund of the $8 filing fee payment was directed, but the claimants refused to accept it, still asserting their right to possession of the subject claims notwithstanding the holding by Judge Rampton.

Thereafter, on July 1, 1968, the Arizona State Office, BLM, advised the contestees that the Ruth Nos. 1 through 8 lode mining claims had been declared void. The letter further stated that the Government would not authorize continued occupation of the claims for residence purposes or approve a right-of-way to the Salt River Project to extend an electric power transmission line to the residence of the claimants. Contestees were advised that the land involved was within a withdrawal for a right-of-way corridor and for a stock driveway. Contestees replied that they would not accept the Judge's decision that the claims were void nor the attempts by BLM to dispossess them from the Ruth claims. In 1971, BLM requested the United States Attorney for Arizona to initiate legal action to remove the contestees occupying the public land in trespass.

From that point, there is a lacuna in the record before us until the Court of Appeals for the 9th Circuit issued a memorandum, dated February 25, 1976, entitled United States of America, appellee, v. Andy Syndbad, appellant, No. 75-1011. The memorandum recites:

> The Government did not carry its burden on summary judgment of proving service in compliance with the Bureau of Land Management's own rules (43 C.F.R. §§ 1840.0-6(e), 1850.0-6(e)). Moreover, the form of service adopted was not reasonably calculated, under the circumstances of this case, to give Syndbad actual notice. (Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1949).) The record is inadequate to sustain summary judgment on the theory that, despite the deficiencies in service, Syndbad had actual notice of the fate of his appeal in time to cure the defects called to his attention by the unserved notice.
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> Moreover, we are not convinced that the Government proved its entitlement to ejectment. To be sure, the subject land was withdrawn from mineral entry, but it was not withdrawn for other purposes. We cannot tell from this fragmentary record whether, after withdrawal, Syndbad could or could not have been treated as a licensee or tenant at will (Pub. Land Order No. 5070, 36 Fed. Reg. 11731, see, Cole v. Ralph, 252 U.S. 286, 294-95 (1920); Barton v. Morton, 498 F.2d 288, 292 (9th Cir. 1974)). Nor can we ascertain whether Syndbad is or can become a lessee. (See United States v. Wharton, 514 F.2d 406, 413 (9th Cir. 1975).)
>
> Reversed.

By order of this Board, 3/ dated April 24, 1978, the contest, styled United States v. Syndbad, Alexander, and Mason, Arizona 034833, was reopened. Contestees were allowed a period of 30 days within which to appeal from the decision of Judge Rampton dated August 28, 1967. Pursuant to this order, Syndbad filed a timely notice of appeal and submitted evidence showing that he is now the sole claimant to the Ruth Nos. 1 through 8 lode mining claims.

In the present appeal, Syndbad contends that the Government did not make a prima facie case of invalidity against the Ruth Nos. 2, 4, 5, 6, and 7 claims; that the Rampton decision as to the Ruth Nos. 1, 3, and 8 claims should be set aside and the matter remanded for a new hearing to allow Syndbad to produce evidence in support of these claims; and if it is concluded that a prima facie case was made against the Ruth Nos. 2, 4, 5, 6, and 7 claims, that decision should be set aside and those cases also remanded for a new hearing.

3/ With the establishment of the Interior Board of Land Appeals within the Office of Hearings and Appeals, July 1, 1970, 35 FR 12071 (1970), filing fees for appeals were discontinued, and jurisdiction over appeals from decisions by BLM was given to IBLA. Appeals to the Director, BLM, were eliminated, as were appeals from his decisions to the Assistant Solicitor-Land Appeals.

The Government answered the statement of reasons, arguing generally that the matter should be decided on the present record and that the decision of Judge Rampton should be affirmed.

The mining law provides that public lands owned by the United States and not otherwise withdrawn from operation of the mining law are open to location of mining claims, but one who has located a mining claim upon public domain has, prior to discovery of a valuable mineral deposit, only taken the initial steps in seeking a gratuity from the Government. Until he has fully met the statutory requirements, including discovery, title remains in the United States. See Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The only statutory standard, found at 30 U.S.C. § 23 (1976) is "discovery" of "veins or lodes" containing "valuable deposits" of certain minerals named therein. Converse v. Udall, 399 F.2d 616, 619 (9th Cir. 1968). The accepted standard provides that discovery of a valuable mineral deposit has been made where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. This standard was first enunciated in Castle v. Womble, 19 L.D. 455, 457 (1894), and has been approved on many occasions by the Supreme Court, e.g., Chrisman v. Miller, 197 U.S. 313 (1905); Cameron v. United States, 252 U.S. 450 (1920); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1962); United States v. Coleman, 390 U.S. 599 (1968). Recent decisions of this Board include United States v. Melluzzo, 38 IBLA 214, 85 I.D. 441 (1978) and United States v. Johnson, 33 IBLA 121 (1977). The "prudent man" test has been complemented by a "marketability test," requiring that it "be shown that the mineral can be extracted, removed and marketed at a profit." United States v. Coleman, supra; United States v. Miles, 36 IBLA 213 (1978); United States v. Rodgers, 32 IBLA 77 (1977).

In support of his contention that the Government did not make a prima facie case against the Ruth Nos. 2, 4, 5, 6, and 7, appellant leans heavily upon the Board's decision in United States v. Arizona Mining and Refining Co. (AMARCO), 27 IBLA 99 (1976). Appellant argues that AMARCO stands for the following propositions:

1. A mining examiner is obligated to inspect and sample each claim individually;

2. A mining examiner is obligated to inspect and sample each discovery point at which the claimant has allegedly discovered valuable minerals;

3. If samples with negative results are taken elsewhere on the claims, such samples merely delineate the outer limits of the mineralized area claimed by the claimant;

4. If the Government attempts to establish a prima facie case without sampling, the mining examiner must testify that he inspected the claim and found insufficient exposed or accessible mineralization to warrant taking samples; and

5. A prima facie case of invalidity is not established as to a particular claim unless the Government's evidence relates directly to that claim.

Appellant asserts that the Government failed to establish a prima facie case as to the Ruth Nos. 2, 4, 5, 6, and 7 for the following reasons:

1. No evidence directly related to the Ruth No. 4 was given;

2. The examiner failed to sample discovery points shown by Syndbad on the Ruth Nos. 2 and 7; and

3. The examiner panned but did not assay the samples taken from the Ruth Nos. 5 and 6.

The Government has established a prima facie case when a mineral examiner testifies that he has examined a mining claim and has found the mineral values insufficient to support a finding of discovery. United States v. Garner, 30 IBLA 42 (1977); United States v. Pagel, 29 IBLA 201 (1977).

[1] Charles K. Miller, a Government mining engineer, testified that he, accompanied by mining engineer Clemmer and Syndbad, made an examination of all of the claims on June 25, 1965 (Tr. 17). He described the samples marked R-4, R-4-A, and R-4-B as having been taken close to the east line of Ruth No. 4 and west line of Ruth No. 3. Positive identification that the samples were taken from Ruth No. 3 was made from later field examination and study of aerial photographs. He testified that Syndbad had pointed out the end monumentation for each claim and those sample points which he (Syndbad) felt would best represent a discovery for each claim (Tr. 21).

In response to the question: "Did he point any discovery points for claims 1, 2 and 7?", Miller testified: "Yes. He pointed out discovery points for No. 1, No. 2 and No. 7, and No. 4 other than the side line claim, which applies in this case here. But No. 2 and No. 7 indicated that he had no discovery points there" (Tr. 21). As it appears in the transcript, this answer is self contradictory and does not make sense. It is possible that the transcript does not accurately reflect what was actually said. It may be that an error in transcription occurred because of the similarity between the abbreviation "No." and the word "no" in the stenographer's notation. Taken in the context of his total testimony, we think it possible that Miller said: "He pointed out discovery point number 1, no 2, no 7, and no 4

other than the side line claim. But number 2 and number 7 indicated that he had no discovery points there." This suggested interpretation accords with Miller's taking of samples at all other points identified by Syndbad. It is noteworthy that neither Syndbad nor Alexander questioned the omission of samples on Ruth No. 2 or Ruth No. 7 during their cross-examination of Miller. In any event, Miller did take samples from both Ruth No. 2 and Ruth No. 7 at a later date.

Appellant charges there is no direct evidence relating to Ruth No. 4, as samples R-4, R-4-A, and R-4-B were acknowledged by the Government to have been taken from Ruth No. 3. As Miller stated, he in company with Clemmer and Syndbad made a reconnaissance of all the claims and sampled at points indicated by Syndbad (Tr. 21). Syndbad did not challenge that testimony during cross-examination, nor did he say that he had indicated to Miller or Clemmer any place where he might have made a discovery within Ruth No. 4. Syndbad did not suggest any discovery point on any claim from which he wanted a sample taken where Miller did not oblige.

Appellant argues that failure of the mining examiner to assay samples panned from Ruth Nos. 5 and 6 requires denial of a prima facie case against these claims. Appellant has misconstrued AMARCO, supra, in its application to the present case. AMARCO held, inter alia:

> Although, in a mining claim contest, the Government may make a prima facie case of no discovery by the testimony of a mineral examiner that he has been on the land in issue and saw nothing of mineral value, a prima facie case is ordinarily not made where it is established that the examiner was not on the land in issue.

Therein, we also said:

> In a mining claim contest where a contestee is of the opinion that the Government did not make a prima facie case of no discovery, he may move to have the case dismissed at the conclusion of the Government's case, and then rest. The contest complaint could be dismissed if the Administrative Law Judge rules that no prima facie case had been made of lack of discovery and there is no other evidence in the record to support the charges in the complaint. But if the contestee goes forward after making such a motion to dismiss and presents his evidence, that evidence must be considered as part of the entire record and its probative value will be weighed. Thus, even if the Government has failed to make a prima facie case, evidence presented by the contestee which supports the Government's contest charges may be used against the contestee, regardless of the defects in the Government's case.

Following the Government presentation, Syndbad did not move to dismiss for failure of the Government to make a prima facie case, but rather

fulminated against the system of contest proceedings in the Department. Nor did he present any evidence to support his assertion of discovery on the individual Ruth claims. To the contrary, he stated, although not under oath:

> First, did I expose a lode? I exposed more than one lode. If you ask me is it a mineralized lode, no. Then, I say no, because the lode that I exposed is a purely caliche lode above the mineralized vein which is below in this caliche overburden. It is all conglomerate, and there would not be any mineral in it. I do not expect any. But yet the actual lode has not been exposed yet below. The indications are there. [Tr. 93.]
>
> At this point here I am prospecting now, so I do not expect if I had anything minable I would be here to apply for patent. I would not care about it. But now at this time I haven't reached that point. So I am here just to have the right to mine under the mining law and I will explore - in other words keep on exploring. See? [Tr. 96-97.]

Where the Government fails to present a prima facie case, a contestee, upon timely motion, may move to dismiss the case and then rest. If, however, he goes forward and presents evidence, that evidence will be considered as part of the entire evidentiary record. Therefore, even if the Government has failed to make a satisfactory prima facie case, or the case is weak, contestee's evidence may be used against him to establish that case. Furthermore, where contestee chooses to rebut the case, he must do so by a preponderance of the evidence, bearing the risk of nonpersuasion if he fails. United States v. Bechtold, 25 IBLA 77 (1976); United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1976).

Without acknowledging any of the alleged defects in the Government's prima facie case as pointed out by counsel for appellant, we find that the statements of Syndbad, above quoted, show that he had not exposed a mineralized lode on any of his claims. Without such a lode, he could not have the discovery of a vein or lode containing a valuable deposit as required by 30 U.S.C. § 23 (1976). His acknowledgment that he was still prospecting after some 20 years on the land supports our finding of no discovery on any of the claims.

In his second argument on appeal, appellant claims that he was unprepared to defend the claims against the Government at the 1967 hearing.

In an affidavit accompanying his statement of reasons, Syndbad states:

> We did not know what the purpose of this hearing was and we appeared as ordered by the notice without any witnesses or evidence on our behalf. We were never told what

> procedure would be followed in the hearing and we also did not understand what was expected of us. Exhibit 1, page 2, lines 8-12.

The contest complaint succinctly set out the Government's allegation that valuable minerals had not been found within the limits of the Ruth Nos. 1 through 8 lode mining claims so as to constitute a valid discovery within the meaning of the mining law. The complaint concluded with the Government's prayer that it be allowed to prove its allegations seeking to have the claims declared null and void. Although the contestee Alexander professed not to have any idea what the hearing was about (Tr. 66), he did claim that he could read English and discoursed at some length on the constitutionality of an administrative tribunal where the contestant and hearing examiner are employees of the same Governmental agency (Tr. 74). It is presumed that everyone who deals with the Government is aware of the pertinent rules and regulations. 44 U.S.C. §§ 1507, 1510 (1976); Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Verner F. Sorenson, 32 IBLA 341 (1977). The Government contest regulations controlling here are duly promulgated regulations. 43 CFR 1852.2-2 (1965); 29 FR 4329 (Mar. 31, 1964), as amended, 29 FR 9565 (July 15, 1964).

[2] Syndbad concedes on appeal that his failure to present evidence in his own behalf is partly the cause of the incomplete record, but he also attributes part of the onus to the allegedly haphazard and superficial inspection of the claims by the Government's examiners. He thus seeks a new hearing. Appellant errs in his interpretation of the law. A sufficient prima facie case by the Government in a mining contest does not require positive proof that there has been no discovery made or that the mining claim is nonmineral in character. Upon the Government's presentation of a prima facie case, the burden shifts to the claimant to prove by a preponderance of the evidence that he indeed has a discovery of a valuable mineral deposit within the limits of the claim. Bechtold, supra; United States v. Maley, 29 IBLA 201 (1977).

[3] A second hearing will not be afforded where a claimant was given notice and an opportunity to appear at a hearing, where he actually was present at the hearing, and where nothing has been submitted which suggests that another hearing would produce a different result. Cf. United States v. Johnson, supra. A petition to reopen a hearing for submission of further evidence will be denied when the contestee offers no valid justification for the neglect to offer evidence which was or could have been available at the original hearing. United States v. Hanson, 26 IBLA 300 (1976). A further hearing will not be ordered merely to afford a claimant an additional opportunity to explore and make a discovery of a valuable mineral deposit. United States v. Mattox, 36 IBLA 171 (1978).

Whether appellant was aware of the burden of proof at a Government contest hearing is not material. If he were not so aware, prudence would surely have dictated that he make inquiry upon receipt of the contest complaint to ascertain what he would be required to do at a hearing. We do not agree with Syndbad when he now claims he was denied constitutional due process in this proceeding. The essence of due process is notice and an opportunity for a hearing, both of which were given to Syndbad.

Appellant's argument that he will be divested of property in which he had invested much time and means if the Ruth claims are declared invalid cannot stand close scrutiny. The land embraced in the subject mining claims is owned by the United States. Under the mining law, a claim may be located on public land open to the operation of the mining law, but until discovery of a valuable mineral deposit is made within the limits of the claim, the locator-claimant has no right to the land other than to prospect for mineral. If the Government has a different use for the land and prevails in proving its charge of no discovery after notice and a hearing, the locator has not been divested of any property right within the ambit of the Fifth Amendment.

Our review of the record in this proceeding persuades us that the evidence submitted at the hearing fully supports the decision of Judge Rampton. We find the hearing was held in accordance with the Administrative Procedure Act, that the officer who conducted the hearing was qualified under the Act, and that the claimants did not satisfy the requirement of discovery. We note no substantial error in the proceedings. The decision of Judge Rampton must be affirmed.

We feel constrained to make the following comments, though they are not directly related to the present appeal. Information adduced at the hearing (Ex. 3) shows the Ruth group of claims to be situated in E 1/2 NE 1/4, NE 1/4 SE 1/4 sec. 10, W 1/2 NW 1/4, NW 1/4 SW 1/4 sec. 11, T. 1 N., R. 8 E., Gila and Salt River meridian. The BLM land status records for T. 1 N., R. 8 E., show the following actions affecting the availability of the E 1/2 E 1/2 sec. 10 and W 1/2 W 1/2 sec. 11 for mining activities and settlement.

A first form reclamation withdrawal pursuant to the Act of June 17, 1902, section 3, 32 Stat. 388, was made by the Secretary's Order of August 21, 1909, for the Salt River Project. These lands were opened to mining location, entry, and patent by Departmental Order of September 16, 1939, pursuant to 43 U.S.C. § 154 (1976). They have not been opened to settlement under the public land laws.

Exec. Order No. 6910, November 26, 1934, withdrew all public land in Arizona, inter alia, for classification. 43 U.S.C. § 315f (1976).

Order of May 26, 1955, withdrew NE 1/4 sec. 10, W 1/2 NW 1/4 sec. 11 as an addition to Stock Driveway No. 164, Arizona No. 6, pursuant

to the Act of Dec. 29, 1916, section 10, 39 Stat. 865 and 43 U.S.C. § 315f (1976). The lands were withdrawn from disposal under any of the public lands laws, excepting only mineral deposits.

Indemnity List No. 485, approved October 13, 1969, conveyed title to SE 1/4 NE 1/4, N 1/2 NE 1/4 SE 1/4 sec. 10 to the State of Arizona. No minerals were reserved to the United States in this grant.

Public Land Order No. 5070 of June 10, 1971, issued pursuant to Exec. Order No. 10355 and the Act of June 25, 1910, section 1, 36 Stat. 847, withdrew the N 1/2 NE 1/4 sec. 10, W 1/2 W 1/2 sec. 11 from mineral entry.

The Court of Appeals has raised the issue whether, after withdrawal of the land from operation of the mining law, Syndbad could have been treated as a licensee or tenant at will. This suggestion was prompted by the comments of Mr. Justice Van Devanter in Cole v. Ralph, 252 U.S. 286, 294-95 (1920):

> In advance of discovery an explorer in actual occupation and diligently searching for mineral . . . is treated as a licensee or tenant at will, and no right can be initiated or acquired through a forcible, fraudulent or clandestine intrusion upon his possession. But if his occupancy be relaxed, or be merely incidental to something other than a diligent search for mineral, and another enters peaceably, and not fraudulently or clandestinely, and makes a mineral discovery and location, the location so made is valid and must be respected accordingly. [Footnote and citations omitted.]

Justice Van Devanter was careful to restrict the status of licensee or tenant at will to an explorer in advance of discovery who is in actual occupation and diligently searching for mineral. While we acknowledge that a person who is prospecting or who has located a mining claim may occupy the premises as an incident to his diligent search or development, this occupation amounts to a trespass where the premises have been withdrawn from appropriation under the mining law prior to discovery of a valuable mineral deposit. In this case, such a withdrawal was in fact accomplished by PLO No. 5070, signed on June 10, 1971. If appellant could not show a discovery of a valuable mineral deposit on the claim where he was residing prior to the date of withdrawal by PLO No. 5070, his continued occupation of the claim for mining purposes earned him the status of trespasser, rather than licensee or tenant at will. Furthermore, we respond to the rhetorical question of the court and point out that none of the land within the Ruth group of claims was open to settlement or entry under the public land laws generally for many years prior to the inception and location of these claims. We may say unequivocally and categorically that Syndbad could not remain on the land as a licensee or tenant at will

after his claims were declared void, and he could not become a lessee of the Government under any statute presently in force.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Frederick Fishman
Administrative Judge